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No. 83-1593

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

FRANK KUEHNER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the petition for a writ of certiorari, we suggested that the Court might wish to hold the petition and dispose of it in light of its decision in *Heckler* v. *Ringer*, No. 82-1772 (which was then under submission), if the decision in *Ringer* sufficiently addressed the issues presented in this case. In the alternative, we suggested that the petition for a writ of certiorari should be granted. See Pet. 12, 19. The Court rendered its decision in *Ringer* on May 14, 1984. That decision does directly address the issues presented in this case, and indeed respondents concede (Br. in Opp. 10, 11) that *Ringer* furnishes "authoritative guidance" on a number of questions regarding federal court jurisdiction over cases arising under the Social Security Act. In these circumstances, we submit that the appropriate disposition is for the Court to grant the petition in this case, vacate the

judgment of the court of appeals, and remand for further consideration in light of the decision in *Ringer*.[1]

Although respondents agree that *Ringer* affords authoritative guidance, they nonetheless argue that certiorari should be denied. In their view, the decision below is consistent with *Ringer* and, to the extent it is not, it will have no precedential effect. For these reasons, they conclude, this case does not merit "independent review." See Pet. 10-11. Respondents are wrong in contending that the decision below is consistent with *Ringer*. See pages 3-7, *infra*. But however that may be, respondents miss the point. We are not asking the Court to grant plenary or "independent review," and thus to determine in the first instance whether the court of appeals' decision is consistent with *Ringer*. We are simply asking the Court to vacate the judgment below and give the Third Circuit an opportunity to reconsider its own holding in light of the subsequent decision in *Ringer*. That is a routine step for the Court to take, and indeed, in another Social Security case raising jurisdictional issues, the Court already has vacated the judgment of the court of appeals and remanded for further consideration in light of *Ringer*. See *Heckler* v. *Starnes*, No. 83-1149 (June 4, 1984).

Respondents have offered no reason why the Court should not do the same here. In fact, they do not even discuss this option. That course nevertheless is plainly warranted. There is no reason why further proceedings should be required in the lower courts in this massive class action — which respondents allege in their complaint involves

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[1]The House of Representatives passed disability amendments (H.R. 3755) on March 27, 1984 (130 Cong. Rec. H1992-H1993 (daily ed.)), and the Senate passed a different version of H.R. 3755 on May 22, 1984 (130 Cong. Rec. S6241 (daily ed.)). The bill now is awaiting consideration in Conference.

more than 250,000 potential class members (C.A. App. 5; see Pet. 6-7) and which accordingly could cause a substantial disruption in the administrative adjudication of claims in Pennsylvania — until the court of appeals has had an opportunity to reconsider its jurisdictional ruling in light of *Ringer*.

2. Because we do not ask the Court to grant plenary review, we shall only briefly answer respondents' attempts to defend the judgment below. The Third Circuit's decision and respondents' submission simply cannot be reconciled with *Ringer*.

First, the Court held in *Ringer* that 42 U.S.C. 405(h) bars the exercise of federal question jurisdiction under 28 U.S.C. 1331 over claims arising under the Social Security Act (slip op. 11-12, 17-23). Yet the court of appeals in this case held that the district court did have jurisdiction under 28 U.S.C. 1331 insofar as the action was brought against the state officials (Pet. App. 5a-7a), and respondents argue (Br. in Opp. 12 n.13) that the district court also had jurisdiction even as against the federal defendants under 28 U.S.C. 1331. Second, the Court held in *Ringer* that, even assuming 42 U.S.C. 405(h) does not altogether foreclose mandamus jurisdiction in Social Security cases, the exercise of mandamus jurisdiction is in any event barred where the plaintiff has an adequate remedy in an action for judicial review under 42 U.S.C. (Supp. V) 405(g) (slip op. 12-13). Yet the court of appeals in the instant case held that the district court could exercise mandamus jurisdiction under 28 U.S.C. 1361 even though respondents have an adequate remedy under 42 U.S.C. (Supp. V) 405(g) (Pet. App. 11a-12a).

Third, the Court held in *Ringer* that the district court did not have jurisdiction under 42 U.S.C. (Supp. V) 405(g) because the claimants had not exhausted their administrative remedies, since the Secretary had not waived the

exhaustion requirement and the case did not fall within the narrow exception to the exhaustion requirement recognized in *Mathews* v. *Eldridge*, 424 U.S. 319, 330-332 (1976) (slip op. 13-16). Yet the court of appeals in this case held that the district court did have jurisdiction under 42 U.S.C. (Supp. V) 405(g) even though respondents likewise had not exhausted their administrative remedies (Pet. App. 7a-11a).

Respondents do not attempt to defend the Third Circuit's finding of jurisdiction under 42 U.S.C. (Supp. V) 405(g) on the ground that the Secretary herself has waived exhaustion, as in *Weinberger* v. *Salfi*, 422 U.S. 749, 766-767 (1975); *Mathews* v. *Diaz*, 426 U.S. 67, 76-77 (1976); or *Heckler* v. *Day*, No. 82-1371 (May 22, 1984), slip op. 6 n.14. See also *Heckler* v. *Ringer*, slip op. 14-15 & n.11. Respondents argue (Br. in Opp. 14-19), however, that a court may "waive" the exhaustion requirement based on its own finding of futility, even though the Secretary has not done so. But this Court explicitly held in *Salfi* that a court may *not* excuse exhaustion based on a judicial finding of futility, as the district court there had done (422 U.S. at 766), and the Court so held even though the issue the plaintiff sought to raise in *Salfi* was the constitutionality of a provision of the Social Security Act that was beyond the competence of the Secretary to decide. A fortiori, that aspect of *Salfi* applies in this case, in which respondents challenge what they term (Br. in Opp. 15, 16) the "evidentiary standards" applied to their cases at the administrative level, since those standards are within the Secretary's competence to decide. See 42 U.S.C. 405(a); *Heckler* v. *Campbell*, No. 81-1983 (May 16, 1983), slip op. 7-8; *Heckler* v. *Ringer*, slip op. 15 n.11.

Contrary to respondents' contention (Br. in Opp. 14), the Court in *Ringer* did not overrule the holding in *Salfi* that a court may not substitute its judgment for that of the Secretary on the question of the futility of exhaustion; the Court

explicitly held that "the Court of Appeals erred in second guessing the Secretary's judgment" (slip op. 15). Moreover, respondents concede (Br. in Opp. 7-8 n.11) that 11 of the 16 named plaintiffs who had not exhausted their administrative remedies when this suit was filed succeeded in having their benefits reinstated at the administrative level. Therefore here, as in *Ringer* (slip op. 15-16), exhaustion is "in no sense futile" for the members of the respondent class. Even the dissenting Justices in *Ringer* agreed that full exhaustion is required where, as here, payment of the claim for benefits is not foreclosed at the adminstrative level (slip op. 2, 12-13 (Stevens, J., dissenting)).

Respondents also contend (Br. in Opp. 15-16) that the issues they seek to raise fall within the narrow exception in *Mathews* v. *Eldridge* excusing exhaustion for "wholly collateral" issues where there is a colorable claim of injury that could not be remedied by a retroactive award of benefits. See also *Heckler* v. *Ringer*, slip op. 14-15. That contention is frivolous. The "evidentiary standards" to be employed in adjudicating a claim for benefits, which respondents challenge here, are no more collateral to the claims for benefits than were the various "procedural" issues involved in *Ringer*. Nor have respondents made a colorable showing that their alleged injury could not be adequately remedied through a retroactive award of benefits. In *Eldridge*, the plaintiff's collateral argument was that he had a constitutional right to a hearing before his benefits were cut off, and the distinct injury that would result from the asserted constitutional violation — a termination of benefits without a prior hearing — could not be remedied by a retroactive award of benefits at a later date. Here, in contrast, respondents do not contend that they will suffer any distinct injury as a result of the Secretary's ruling on what they label "collateral" issues. Respondents simply contend that they may suffer hardship as a result of an erroneous denial of

benefits on the merits while they await a possible reversal on administrative or judicial review. That contention presumably could be made in any Social Security disability case in which benefits are denied at the initial determination stage. Yet in deliberately applying the established multi-level administrative review procedure to disability cases (see Pet. 12-15), Congress obviously determined that the usual statutory remedy for an erroneous denial of benefits at the initial determination stage — a retroactive award of benefits at a later stage of administrative or judicial review — would be an adequate remedy under the disability program as well. As this Court recently observed, Congress presumably concluded that cases of individual hardship pending administrative review must be balanced against the potential for premature judicial intervention into an administrative system under which millions of claims are adjudicated each year. *Heckler* v. *Ringer*, slip op. 23-24. And where Congress has wished to alleviate individual hardship, it has authorized the payment of interim benefits pending administrative review (see Pet. 4 & n.1); it has not authorized circumvention of that review, as respondents urge.

Finally, respondents appear to argue (Br. in Opp. 19-23) that established exhaustion and jurisdictional rules should be abandoned because, they assert, the Secretary has not acquiesced in Third Circuit precedent concerning the "evidentiary standards" they challenge. We disagree with the notion that a challenge to the Secretary's alleged failure to follow a particular appellate decision — which is essentially an assertion of nonmutual collateral estoppel against the government of the kind the Court rejected in *United States* v. *Mendoza*, No. 82-849 (Jan. 10, 1984) — is not subject to the usual exhaustion and jurisdictional rules. But in any event, respondents did not allege in their complaint in this case that the Secretary has not followed Third Circuit precedent on the particular "evidentiary standards"

involved (C.A. App. 2-29). Nor is the Third Circuit's ruling excusing exhaustion under 42 U.S.C. (Supp. V) 405(g) and finding mandamus jurisdiction under 28 U.S.C. 1361 limited to situations in which the Secretary allegedly has not acquiesced in circuit precedent; it is sufficient under the court of appeals' holding if a plaintiff alleges that the Secretary has formed a "fixed position" on a particular issue involved in a claim for benefits, whatever the courts might have said on that issue (Pet. App. 7a-12a).

For the foregoing reasons and the additional reasons stated in the petition, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further consideration in light of *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984).

Respectfully submitted.

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